

## **BREXIT ALERTER**

### **Divisional Court rules that the Crown has no power to give notice under Article 50**

***R (Miller & anor) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)***

**Counsel:** Patrick Green QC, Henry Warwick, Paul Skinner and Matthieu Gregoire, instructed by Croft Solicitors

**Alerter by:** Paul Skinner

**Yesterday, the Divisional Court (Lord Thomas CJ, Sir Terence Etherton MR, and Sales LJ) upheld the submission of the Claimants and, among others, a team of counsel from Henderson Chambers, instructed by Croft Solicitors on behalf of *Fair Deal for Expats*, that the government cannot, by the exercise of the Royal Prerogative, trigger Article 50.**

#### **INTRODUCTION**

- I. Brexit will bring about profound change to the legal landscape for all of us and the clients we advise. Given the extent to which much of industry across Europe is centrally regulated, it affects also not only individuals and their rights but many business sectors – EU law stretches into fields in which we, as a Chambers, advise and represent clients on a daily basis, whether that be environmental law, banking and

financial regulation, product liability, health and safety, consumer law, employment law, public law or public procurement.

2. This alert therefore provides an overview of the Judgment of the Divisional Court in the Article 50 Judicial Review handed down yesterday, what it means and where things go from here, which it is hoped will be useful to all our clients, regardless of the industry on whose behalf or area of law in which you come into contact with us.

### ARTICLE 50 TEU

3. The way in which an EU Member State can leave the EU is set out in Article 50 of the Treaty on European Union (as amended by the Treaty of Lisbon), particularly as follows:

*“(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

*(2) A Member State which decides to withdraw shall notify the European Council of its intention...*

*(3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”*

4. The crucial question for the Court was whether the notification, and the decision with which it is inextricably bound, can be given under the Crown’s prerogative powers.
5. Two important aspects of Article 50 were accepted by the Secretary of State:
  - a. Notice under Article 50 cannot be withdrawn or revoked; and
  - b. Notice cannot be conditional, upon, for example, Parliamentary approval of the negotiated agreement between the UK and the remaining EU states.

6. It follows from this that once Article 50 is triggered, it will inevitably result in the withdrawal of the UK from the EU after two years (or less, if there is an agreement to withdraw) from the date of notification, unless an extension of time is agreed by all EU Member States. Thus, as the Court held, “*the effect of the giving of notice under Article 50 on relevant rights is direct, even though the Article 50 process will take a while to be worked through.*” The Court classified the rights that might be affected into three categories: (i) those capable of replication in the law of the UK, such as the rights of workers under the Working Time Regulations, or the right to bring a claim in relation to defective products, (ii) rights enjoyed by UK citizens or companies in other EU Member States, and (iii) rights that could not be replicated in domestic legislation, such as the right to seek a reference to the Court of Justice in Luxembourg.
7. This effect of the purported exercise of the prerogative powers of the Crown is fundamental to understanding the dispute.

### **THE BATTLEGROUND BETWEEN THE PARTIES**

8. The Government’s position was that the power to withdraw from Treaties is one vested in the Crown, exercisable by the Government, by virtue of the Royal Prerogative, which can only be taken away by express language in an Act of Parliament, or by necessary implication.
9. By contrast, the Claimants, Interested Parties and Interveners, including our clients, Fair Deal for Expats, (the “Claimant Parties”) contended that the giving of notice under Article 50 was something that the Government, without Parliamentary authority, did not have the power to do. For among other reasons, this is because it is not for the executive, acting under the Royal Prerogative, to undermine rights conferred by Parliament.
10. Ultimately therefore, the question is one of process, not outcome, and is a question of UK Constitutional Law.

## THE UK'S CONSTITUTION

11. The Court made six points of general application in relation to the UK's constitution:
  - a. The first is that it has a constitution, albeit not one that is written down in one place;
  - b. Second, that Parliamentary sovereignty is "*the most fundamental rule of UK constitutional law*";
  - c. Third, that the scope of the Crown's prerogative powers is delineated by constitutional law;
  - d. Fourth, the effect of the principle of Parliamentary sovereignty is that the executive cannot use prerogative powers to prescribe or alter the law of the land;
  - e. Fifth, and importantly, whilst there undoubtedly exists a prerogative power to make and un-make international treaties, the rights and obligations that arise under them take effect only on the international plane. It is, the Court held, precisely because the prerogative power does not affect domestic law rights and duties that it is regarded as wide and as being outside the purview of the courts;
  - f. Sixth, and also importantly, the Court gave express recognition to the principle that statutes are to be interpreted in light of constitutional principles. The stronger the constitutional principle, the more ready a court will be to interpret legislation to give effect to it and, conversely, not to undermine it.

## THE REJECTION OF THE GOVERNMENT'S CASE

12. The Secretary of State's primary submission was that under the European Community Act 1972 ("the ECA 1972"), the content of EU rights is defined by reference to the EU Treaties. This means, it was said, that Parliament intended there to be a continuing condition for the existence of any EU rights to be given effect in domestic law, namely continued membership of the EU by the UK. If that were correct, there would be no violation of the principle that the Crown has no prerogative power to alter the law of

the land because the law would be subject to the power of withdrawal. Under the Government's approach, the resolution of the case would depend upon whether the Claimant Parties could point to an intention on the part of Parliament to remove the Crown's prerogative powers.

13. The Court rejected the Government's approach. The Government glossed over, the Court held, the need to interpret legislation in its constitutional context, omitting for consideration the principle that, unless Parliament legislated to the contrary, the Crown should not have the power to vary the law of the land by the exercise of its prerogative powers.
14. Thus, interpreting the ECA 1972 in light of the constitutional background, the Court considered that it is clear that Parliament intended to legislate so as to introduce EU law into domestic law in such a way that this could not be undone by exercise of Crown prerogative power.

### **ACCEPTANCE OF THE CLAIMANTS' CASE**

15. The Claimant Parties all argued that the Crown cannot alter domestic law without the authority of Parliament. As there was nothing in the ECA 1972 to indicate any intention to give the Government the power to withdraw from the EU Treaties, the Government simply lacked the relevant power.
16. The Court accepted this approach. The Court considered that there was nothing in the ECA 1972, or any subsequent statute relating to the ratification of later EU Treaties or indeed the European Union Referendum Act 2015 to grant any such power to the Crown.
17. Because the Claimants won on their primary case, it was not necessary for the Court to delve into the other issues raised, such as whether, if there was a prerogative power, it could be used to expand the powers of the devolved Scottish, Welsh and

Northern Irish legislatures, which are expressly bound by the limits of EU law. The Court accordingly left these questions for another day.

### WHERE NEXT?

18. As the above explains, this case is not about whether the UK's withdrawal from the EU can or should take place. That is a political, not a legal question. The High Court's decision simply tells us that the Government cannot, without Parliamentary approval, notify the EU of the UK's decision to leave the EU.
19. At the handing down of judgment, the Government applied for and obtained a certificate from the court that this was a case suitable to leapfrog over the Court of Appeal straight to the Supreme Court. Indeed, an appeal to the Court of Appeal would be odd, as the Divisional Court was comprised of the two most senior Court of Appeal judges and arguably its leading judge in the area of constitutional law.
20. The government has not yet applied, as far as we know, to appeal to the Supreme Court however. That application must be made directly to the Supreme Court itself. Whilst permission would undoubtedly be granted, it does remain open to the government to put forward a bill giving them the power to send an Article 50 notification instead of pursuing an appeal. Indeed absent a successful appeal that is what it would have to do in order to give notification under Article 50.
21. However the Government announced yesterday that they intend to appeal, and the Supreme Court has put aside some time to hear the case in December in the event that they do. It is likely to be heard by an enlarged panel of the Court – although the Supreme Court has not confirmed this; there are suggestions that the Court might decide to sit for the first time ever *en banc*, that is, with all 11 of the Supreme Court Justices hearing the case.

**Paul Skinner**

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